

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
:
-against- :
:
ALDO MITCHELL, :
:
Defendant. :
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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: Feb. 20, 2013

JOHN F. KEENAN, United States District Judge:

Before the Court is Defendant Aldo Mitchell's ("Mitchell" or "Defendant") motion to proceed in forma pauperis on the appeal of this Court's Order dated January 5, 2012 (the "Order"), which denied his motion for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2). Mitchell has also filed a notice of appeal of the Order, which the Court liberally construes as a motion for an extension of time. For the reasons that follow, both motions are denied.

On July 28, 2000, after a jury trial, Mitchell was convicted of (1) a racketeering conspiracy involving the distribution of cocaine base as well as attempted robbery, in violation of 18 U.S.C. § 1962(d); (2) a conspiracy to commit robbery, in violation of 18 U.S.C. § 1951; and (3) the attempted armed robbery of a drug dealer, during which the victim was shot, in violation of 18 U.S.C. § 1951. At the time of Mitchell's sentencing on March 26, 2001, his applicable sentencing range under the U.S. Sentencing Guidelines was 360

months to life. The Court sentenced him to 360 months. Mitchell moved under § 3582 for a sentence reduction on November 14, 2011, which this Court denied in its January 5, 2012 Order. Over one year later, on January 23, 2013, Mitchell filed both a notice of appeal from the Order and a motion for leave to appeal in forma pauperis.

Rule 4(b) of the Federal Rules of Appellate Procedure states that a defendant's notice of appeal must be filed in the district court within fourteen days of the entry of the order being appealed. Fed. R. App. P. 4(b)(1)(A)(i). Although both of Mitchell's filings state that the Order was entered on January 5, 2013, this is incorrect – it was entered one year earlier, on January 5, 2012. His notice of appeal was thus due on January 19, 2012, and is untimely by almost a full year.

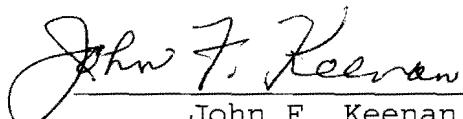
Bearing in mind that Mitchell's pro se motions must be "liberally construed in his favor," Simmons v. Abruzzo, 49 F.3d 83, 87 (2d Cir. 1995) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)), this Court may construe his notice of appeal as a motion to extend his time to file. Cf. United States v. Munoz, No. C-06-14, 2010 WL 5391191, at *1 (S.D. Tex. Oct. 25, 2010). Even so, Rule 4(b) permits a district court to extend the time to file a notice of appeal only up to thirty days and only upon "excusable neglect or good cause." Fed. R. App. P. 4(b)(4). Because almost a full year has elapsed, the Court cannot grant

any extension of time to appeal. See United States v. Lucangeli, No. 99-cr-637, 2000 WL 23175, at *1 (S.D.N.Y. Jan. 13, 2000).

Moreover, a defendant is not permitted to proceed in forma pauperis if the appeal is not taken in good faith. See 28 U.S.C. § 1915. An appeal cannot be taken in good faith if it is frivolous, Davidson v. Murray, 371 F. Supp. 2d 361, 376-77 (W.D.N.Y. 2005), such as when it "lacks an arguable basis in law or fact," Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995). If convinced that the appeal is frivolous, "it is the duty of the trial judge, albeit not a pleasant duty, to certify that the appeal is not taken in good faith." United States v. Farley, 238 F.2d 575, 575 (2d Cir. 1956). In this case, Mitchell's appeal lacks an arguable basis in law because of its untimeliness. The Court therefore certifies that any appeal would not be taken in good faith, and in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: New York, New York
February 20, 2013


John F. Keenan
United States District Judge